SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 573

GOVERNOR CLAUDE R. KIRK, JR., ET AL.,
Appellants,

—vs—

ROBERT H. HARGRAVE, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANTS

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INDEX

	Page
Opinion Below	1
Jurisdiction	1-2
Statute Involved	2
Statement of the Case	2-4
Questions Involved	5
Argument:	5-20
I.	5-9
II.	9-14
III.	14-17
IV.	17-20
Conclusion	21

APPENDIX:

Amended Complaint	3
Answer to Amended Complaint	27
Affidavit of Hershel Shanks, with attachments	29
Plaintiffs' motion for summary judgment	35
Affidavit of Lee Young	37
Defendants' motion for summary judgment	43
Order of the Three-Judge Court	44
Notice of Appeal	55

TABLE OF AUTHORITIES

Cases *Page*

Baggett v. Bullitt, 377 U.S. 360 2

Burruss v. Wilkerson, 301 F. Supp. 1237 aff'd *per curiam* 38 U.S.L.W. 3310 (1970) 19

City of Meridian v. Southern Bell Telephone and Telegraph Company, 358 U.S. 639 (19) 6

Dandridge v. Williams, 397 U.S. 471 (1970) 13, 15, 16

Flast v. Cohen, 392 U.S. 83 2

Florida Lime and Avocado Growers, Inc. v. Jacobson, 362 U.S. 73, 85 1

Hargrave, et al, v. McKinney, et al., 413 F.2d 320 8

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) 15

McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969) 15

McGowan v. Maryland, 366 U.S. 420, 426 (1961) 15

McInnis v. Ogilvie, 384 U.S. 382 (1969) 19

McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill.) 19

Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913) 15

Palmetto Fire Insurance Co. v. Connecticut, 272 U.S. 295, 305 1

Reetz v. Bozanich, 397 U.S. 82 (1970) 7

School Board of Broward Co., Florida v. Floyd T. Christian, Case No. 69-932, Second Judicial Circuit In and For Leon County, Florida 6

Shapiro v. Thompson, 394 U.S. 618 (1969) 14, 17, 18

	Page
Shelton v. Tucker, 364 U.S. 479	2
Constitutions	
Article VII, § 8, Florida Constitution	3
Article VII, § 9, Florida Constitution	2, 3
Article IX, § 1, Florida Constitution	2
Fourteenth Amendment, U.S. Constitution	7 et seq.
Statutes	
236.01-.071, Florida Statutes	4
236.07, Florida Statutes	10
236.251, Florida Statutes	2 et seq.
28 U.S.C., § 1253	1

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OPINION BELOW

The decision of the statutory Three-Judge United States District Court for the Middle District of Florida is not reported and is printed in the Appendix at pp. 44-54.

JURISDICTION

The decision of the Three-Judge United States District Court for the Middle District of Florida was dated May 8, 1970, and was filed in the District Court for the Middle District of Florida on June 3, 1970. (Appendix pp. 44-54). The jurisdiction of the Supreme Court to review this decision and order by direct appeal is conferred by 28 U.S.C., § 1253. The following decisions, among many, sustain the jurisdiction of the Supreme Court to review the judgment and order on direct appeal in this case: *Palmetto Fire Insurance Company v. Connecticut*, 272 U.S. 295, 305; *Florida Lime and Avocado Growers, Inc. v. Jacobsen*,

362 U.S. 73, 85; *Shelton v. Tucker*, 364 U.S. 479; *Baggett v. Bullitt*, 377 U.S. 360; *Flast v. Cohen*, 392 U.S. 83.

STATUTE INVOLVED

Involved here is the constitutionality of the provisions of § 236.251, Florida Statutes. Since the inception of this action, the foregoing statute has been amended by the Florida Legislature, and the text of the statute, as amended, is printed below in pertinent part.[1]

STATEMENT OF THE CASE

The State of Florida, pursuant to constitutional authorization,[2] makes provision by law for the operation of the State of Florida public schools. Such schools are financed partially from *ad valorem* taxes collected within each school district, partially from appropriations by the state to the several school districts and partially by federal grants and other grants and donations. The amended complaint previously filed herein contains a more than adequate discourse on the methods of public school financing

[1] "236.251. Tax levy; participation in Minimum Foundation Program; limitation.

Effective July 1, 1970, each school board desiring to participate in the Minimum Foundation Program for kindergartens and grades 1-12 shall levy no more than ten mills of tax on the non-exempt assessed valuation of the district, exclusive of millage voted for: local capital improvement; required debt service, required junior college minimum effort, required additional kindergarten local effort, commissions to tax collector and tax assessor, deficit in the state funding of retirement matching, cost of liability insurance due to waiver of sovereign immunity, capital improvements under § 9 of Article VII of the state constitution, and the amount of money necessary to replace any decrease of funds from Public Law 874, decrease meaning the difference between that amount of money received by the school district during the current fiscal year and the largest amount of money received by the said district under the said law subsequent to July 1, 1967.

Section 9. Effective July 1, 1974, § 236.251, Florida Statutes, is repealed."

[2] Article IX, §1, Florida Constitution.

in Florida and it is herein and hereby adopted by appellants. (Appendix page 3 et seq.).

Under the provisions of Article VII, § 9, of the Florida Constitution, a school district may levy *ad valorem* taxes not in excess of ten mills on each dollar of assessed valuation for school purposes. That section of the Constitution also authorizes freeholders within each school district to authorize by referendum the levying of additional taxes for school purposes for periods not in excess of two years.

Appropriation of state moneys (principally derived from sales and use tax) to local school districts is authorized by Article VII, § 8, of the Florida Constitution, which provides that state funds may be appropriated to the several school districts upon such conditions as may be provided by general law.

In the 1968 Special Session of the Florida Legislature, convened to deal with educational financing in the State of Florida, provision was made for an increased allocation of state moneys to the several school districts. In view of the increased appropriation of state moneys for local school purposes and in an attempt to promote a more uniform system of *ad valorem* taxation within the several counties, the Legislature enacted § 236.251, Florida Statutes, here under attack, which established a condition, as authorized by Article VII, § 8, Florida Constitution, upon the appropriation of these state moneys to local school districts. This condition simply stated that in order to be eligible for state appropriated funds, a school district must not assess more than ten mills of *ad valorem* tax for school purposes. (There were certain minor exceptions to the ten mill limitation, but such exceptions are not really material to the issues of this case).

It should be noted at this point that the constitutional authorization for district school boards to levy up to ten

mills of *ad valorem* tax for all school purposes is not a mandate to levy any particular millage but only an authorization to levy that which is required to meet the school district's financial needs. Likewise, when the freeholders of a district authorize the imposition of a millage in excess of ten mills, such authorization again is not a mandate, but simply an authorization.

The appellees, in their various capacities as freeholders; parents or students in the public schools, filed this suit in the United States District Court for the Middle District of Florida alleging the unconstitutionality of § 236.251, Florida Statutes, because of their contention that 10 mills of *ad valorem* tax in one school district would produce fewer dollars per child for education purposes than would 10 mills of *ad valorem* tax in another county. Thus, appellees argued the state could not constitutionally impose an *ad valorem* tax limitation as a condition precedent to the receipt of state funds in aid of local education. After joinder of issues, appellants and appellees each filed motions for summary judgment. The appellees' motion for summary judgment was granted, the Court below finding the provisions of § 236.251, Florida Statutes, to be unconstitutional and enjoining the appellants from withholding state funds from local school districts which exceeded the millage limitation established by § 236.251, Florida Statutes.

During the 1970 legislative session, the Legislature amended the statute under attack as well as other statutory provisions relating to the minimum school foundation funding formula, the effect of which amendments does not serve to change substantially the statute under attack but which does serve to provide for increased state funding of the public schools in Florida.[3]

[3] Florida Statutes §§236.01-236.071 are collectively described as the Minimum Foundation Program.

QUESTIONS INVOLVED

I.

SHOULD THIS COURT ABSTAIN FROM HEARING THIS CASE IN DEFERENCE TO STATE COURT DETERMINATION OF LITIGATION PRESENTLY PENDING, THE OUTCOME OF WHICH MAY RENDER UNNECESSARY A DECISION UNDER THE FOURTEENTH AMENDMENT?

II.

DOES THE MILLAGE ROLLBACK ACT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?

III.

SHOULD THE FLORIDA MILLAGE ROLLBACK LAW BE TESTED BY THE "RATIONAL BASIS" STANDARD OR THE "COMPELLING STATE INTEREST" STANDARD?

IV.

DID THE COURT BELOW ERR IN GRANTING SUMMARY JUDGMENT FOR APPELLEES AND INVALIDATING THE PROVISIONS OF §236.251, FLORIDA STATUTES?

ARGUMENT

I.

THIS COURT SHOULD ABSTAIN FROM HEARING THIS CASE IN DEFERENCE TO STATE COURT DETERMINATION OF LITIGATION PRESENTLY PENDING, THE OUTCOME OF WHICH MAY RENDER UNNECESSARY A DECISION UNDER THE FOURTEENTH AMENDMENT.

There is presently pending before the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, Case No. 69-932, styled *The School Board of Broward County, Florida v. Floyd T. Christian, et al.* wherein it is asserted that §236.251, Florida Statutes, is violative of certain provisions of the Constitution of the State of Florida.

Before concluding, however, that the case *sub judice* is ripe for the application of the doctrine of federal abstention, a review of the leading pronouncements of the Court in this regard might be in order.

Perhaps the most cogent interpretation of the doctrine of abstention was enunciated by the Court in the case of *City of Meridian v. Southern Bell Telephone and Telegraph Company*, 358 U.S. 639 3 Law Ed. 2nd 562, 79 S. Ct. 455 (1959), when it said:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunal preliminary to a federal court's consideration of the underlying federal constitutional questions . . .
>
> "Here the state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court. In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the federal constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily."

The abstention tests enunciated in *Meridian, i.e.*, unsettled questions of state law, the presence of federal questions and the possibility of state court determination rendering a constitutional decision unnecessary, have stood

the test of time and were only recently applied in the case of *Reetz v. Bozanich*, 397 U.S. 82 (1970). Factually, *Reetz* and the instant case are different, but procedurally they are virtually on all fours.

Reetz involved an Alaskan statute and certain regulations limiting commercial salmon fishing licensees to defined groups of persons. As here, the statute and regulations were attacked as being violative of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Defendants moved to dismiss the complaint or in the alternative for a stay pending state court determination of whether the statute and regulations under attack violated provisions of the Alaska Constitution. A Three-Judge District Court denied defendants' motions and entered summary judgment for complainants.

On appeal, Mr. Justice Douglas, speaking for the Court, noted that the case was "virtually on all fours" with the Court's prior decision in *Meridian*. In vacating the judgment of the Three-Judge Court and remanding the cause, the Court reasoned:

> "A state court decision here however could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship."

Asserting that the management of fish resources was a "matter of great state concern" to Alaska, the Court seemingly added another dimension to the *Meridian* test for federal abstention, and, having done so, concluded:

> ". . . for here the nub of the controversy may be the state constitution. We think the federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions."

It is respectfully asserted that all the elements militating for application of the abstention doctrine as enunciated in *Meridian* and *Reetz* are present in the instant case.

The statute under attack here is also being attacked in a state court of competent jurisdiction on the grounds that it is violative of Florida constitutional provisions. No determination has as yet been made on the questions presented in that action and the matter is "unsettled" and "uncertain."

That a federal question is involved in the enactment and or operation of the statute which is the subject of this suit is clear.

Most assuredly, a finding by the state Court in the *Christian* suit that §236.251, Florida Statutes, is violative of the Florida Constitution will obviate the necessity of determining the Fourteenth Amendment question.

It goes without saying that matters of taxation, public school financing and fiscal integrity are matters of "great public concern" to Floridians. Judge Bell, in his dissenting opinion in *Hargrave I*,[1] put the real thrust of appellees' contentions into proper perspective when he said:

> "First, any known principle of comity would dictate that the legality of the statute in question be tested in the state courts. It involves the fiscal affairs of the State of Florida and goes to the heart of the taxing process. The local property tax limitation in question is only a part of the total state and local taxing scheme and legality *vel non* necessarily draws the entire taxing process into consideration. A federal court should be reluctant to interfere with the fiscal affairs of a state even by declaratory judgment."

Viewed in simplest terms, appellees in the instant action are attacking not just a tax limitation statute, but the very

[1] 413 F.2d. 320.

concept of *ad valorem* taxation. Such taxation is by definition based upon wealth, the very classification asserted by appellees herein to be repugnant to the Fourteenth Amendment. It is respectfully submitted that unless the Court is now prepared to test this most basic form of taxation by the standards inherent in the Equal Protection Clause, the decision sought by appellees with its necessary implications would reduce to shambles the fiscal integrity of all states utilizing this form of taxation.

Such a decision at this point in time is neither necessary nor desirable and it is respectfully urged that the doctrine of abstention should be applied in this case, the judgment of the Three-Judge District Court should be vacated and the matter remanded to abide the determination by the state Court of the constitutionality of §236.251, Florida Statutes.

II.

THE MILLAGE ROLLBACK ACT DOES NOT VIOLATE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellees assert that the so-called Millage Rollback Law violates the Equal Protection Clause because "it fails to provide Florida children with an economically equal educational opportunity."[5] It should be noted that the statute complained of is not discriminatory on its face in that it applies a ten mill taxing limitation to all Florida counties if these counties are to continue to partake of Minimum Foundation state funding. The statute in question was amended subsequent to the institution of this action and has been reproduced earlier herein in pertinent part. (See footnote No. 1)

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[5] Plaintiffs brief in support of motion for summary judgment, p. 5, Document No. 282, Original File.

Appellees do not allege that discrimination flows from any uneven administration of this transitional equalization device (See footnote 1, Supra.) or that it is grounded on some hidden motive. Presumably then, the alleged discriminatory effect of the statute flows, if at all, from the simple socio-economic fact that not all Florida counties are on economic par whether in terms of school financing, number and quality of roads, hospitals, or any other index.

To point out the disparity in the operation of the act, appellees note that Bradford County, Florida, can raise $52.00 per pupil by applying the ten mill limitation to the assessed value of non-exempt property within its borders, while Charlotte County with a low pupil-high property value ratio can raise $725.00 per pupil in like manner.[6] By simple mathematical calculation, Bradford county would have to tax local property owners 139.4 mills in order to realize approximately the same per pupil revenue now obtainable in Charlotte County on a levy of ten mills! To ask that the property owner in Bradford tax himself into bankruptcy in order to place his child on economic par with his counterpart in Charlotte County would indeed appear to be a violation of the Equal Protection Clause because it establishes a classification based upon residence.

It is precisely because of county-to-county economic disparity that the Millage Rollback Act was enacted in 1968 as one part of a total plan to more nearly equalize economic educational opportunity for all Florida school children, regardless of residence. Its enactment was accompanied by changes in the Minimum Foundation funding formula which called for a massive infusion of state moneys into the several school districts[7] based upon educational need, admittedly a judicially unmanageable con-

[6] *Ibid.*

[7] Section 236.07, Florida Statutes.

cept. Initial results of this change in emphasis from local support of public education to increased state support are now in and will be published in March of 1971 in the Annual Report of the Commissioner of Education, Floyd T. Christian. These figures were prepared by the State Department of Education of the State of Florida and reflect the per pupil expenditure in Florida from all sources during the [redacted] school year. Because they graphically demonstrate Florida's determined effort to equalize economic educational opportunity, they are reproduced herein.

FEDERAL, STATE AND LOCAL OPERATING EXPENSE PER PUPIL 1969-1970

County	*Current Expense*	*Number of Pupils in Average Daily Attendance—Kindergarten–12th Grade*	*Current Per Pupil Operating Expense Based on Average Daily Attendance*
Alachua	13,561,338.93	20,598	658.38
Baker	1,539,480.06	2,364	651.22
Bay	10,451,925.65	16,685	626.43
Bradford	2,631,765.11	3,553	740.72
Broward	81,645,338.54	103,745	786.98
Calhoun	1,635,300.87	1,938	843.91
Charlotte	3,165,455.24	3,641	869.39
Citrus	2,784,099.53	3,161	880.77
Clay	4,930,166.86	8,282	595.29
Collier	7,867,054.27	8,046	977.76
Columbia	4,436,213.33	6,294	704.83
Dade	185,684,823.41	225,402	823.79
De Soto	1,781,298.55	2,600	685.11
Dixie	1,130,514.26	1,417	797.82
Duval	71,702,353.49	113,773	630.22
Escambia	28,860,877.10	43,161	668.68
Flagler	847,041.92	1,103	767.94
Franklin	1,123,262.01	1,548	723.62
Gadsden	6,296,868.15	10,106	623.08

County	Current Expense	Number of Pupils in Average Daily Attendance—Kindergarten–12th Grade	Current Per Pupil Operating Expense Based on Average Daily Attendance
Gilchrist	809,690.06	945	856.81
Glades	874,785.11	844	1,036.48
Gulf	2,111,752.36	2,803	753.39
Hamilton	1,741,307.00	2,199	791.86
Hardee	2,238,888.99	3,113	719.21
Hendry	1,890,251.72	2,799	675.33
Hernando	2,614,397.29	3,508	745.27
Highlands	4,212,818.36	5,834	722.11
Hillsborough	63,159,337.30	94,725	666.77
Holmes	1,856,439.15	2,557	726.02
Indian River	5,933,213.08	7,501	790.99
Jackson	5,459,278.24	8,024	680.37
Jefferson	1,952,323.60	2,692	725.23
Lafayette	602,992.20	684	881.57
Lake	10,640,057.53	14,278	745.21
Lee	13,068,940.86	18,093	722.32
Leon	14,404,339.95	19,159	751.83
Levy	2,511,033.28	3,126	803.27
Liberty	828,121.26	856	967.43
Madison	2,387,473.15	3,505	681.08
Manatee	12,354,671.61	15,883	777.86
Marion	11,150,099.01	15,194	733.85
Martin	4,007,038.92	5,331	751.65
Monroe	6,934,296.71	9,496	730.23
Nassau	3,580,601.39	5,547	645.50
Okaloosa	14,630,579.30	24,679	592.84
Okeechobee	1,857,017.09	2,706	686.26
Orange	49,629,769.24	75,622	656.29
Osceola	3,399,533.77	5,033	675.45
Palm Beach	54,502,511.53	61,727	882.96
Pasco	6,177,611.26	10,331	597.97
Pinellas	56,602,013.42	76,764	737.35
Polk	34,266,564.42	50,518	678.30

County	*Current Expense*	*Number of Pupils in Average Daily Attendance—Kindergarten–12th Grade*	*Current Per Pupil Operating Expense Based on Average Daily Attendance*
Putnam	5,922,756.76	8,956	661.32
St. Johns	4,565,986.51	6,362	717.70
St. Lucie	7,168,246.09	10,419	688.00
Santa Rosa	6,055,504.22	8,758	691.43
Sarasota	15,335,037.20	17,438	879.40
Seminole	11,083,889.59	19,014	582.93
Sumter	2,352,753.48	3,331	706.32
Suwannee	2,913,598.20	3,807	765.33
Taylor	2,594,540.54	3,694	702.37
Union	932,609.19	1,229	758.84
Volusia	23,631,299.04	30,219	729.05
Wakulla	1,369,253.65	1,553	881.68
Walton	2,572,024.91	3,685	697.97
Washington	2,474,478.06	2,864	863.99
Totals	955,826,721.98	1,312,693	Avg. 728.14

Thus, it can readily be seen that in terms of total funding, the students in the so-called "property poor" counties are not nearly as put upon as appellees assert. They will be, however, if appellees are afforded the relief they seek. To unleash the taxing power of the several school districts by striking down the Millage Rollback Law would compound and magnify the very inequities in public school financing of which appellees complain. The disparity of the tax impact per mill levied would vary so greatly between the property-poor county and the property-rich county as to truly justify a charge of "invidious discrimination", a concept roundly condemned by this Court.*

Lastly, the total financing package enacted by the Legislature in 1968 and amended in 1970 recognizes the

* See *Dandridge v. Williams*, 397 U.S. 471, *infra*.

competition among various governmental subdivisions for the tax dollar. The fiscal integrity of Florida requires an overview of all state and locally funded goods and services to insure fair apportionment of available resources among many worthy programs, including public education.

As stated by this Court in *Shapiro v. Thompson*, at 394 U.S. 618 (1969),

> "A state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education or any other program. . . ."

It is respectfully submitted that the statute in question (1) is not unconstitutional on its face, (2) is not administered unevenly, (3) is not based on some hidden motive, (4) when viewed in context, serves to more nearly equalize educational opportunity insofar as dollar expenditure permits by restricting the otherwise untrammeled taxing power of the wealthier school districts and (5) bears a reasonable relationship to the legitimate state end of preserving fiscal integrity.

Consequently, Section 236.251, Florida Statutes, is not violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

III.

WHETHER THE MILLAGE ROLLBACK ACT VIOLATES THE EQUAL PROTECTION CLAUSE MUST BE DETERMINED BY REFERENCE TO THE "RATIONAL BASIS" TEST RATHER THAN THE COMPELLING STATE INTEREST TEST.

Traditionally, socio-economic regulations by a state claimed to be violative of the Equal Protection Clause have been tested by the "rational basis" standard. If a

classification has some "reasonable basis", it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Company*, 220 U.S. 61, 78 (1911). "The problems of government are practical ones and may justify if they do not require rough accommodations—illogical it may be and unscientific." *Metropolis Theater Company v. City of Chicago*, 228 U.S. 61, 69-70, 57 L.Ed. 730, 33 S.Ct. 441 (1913). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

In *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), the Court determined that a "challenged statute" that bears "some rational relationship to a legitimate state end" "will be set aside only if based on reasons totally unrelated to the pursuit of that goal."

Only recently, in the case of *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court again applied the traditional "rational basis" test in declining to strike down a Maryland welfare regulation limiting the amount any welfare family could receive in a given month regardless of family size or need. Plaintiffs therein had alleged a Fourteenth Amendment violation because the "family size" and "need" tests were not considered by Maryland officials in allocating welfare funds to recipients.

Although noting that the "administration of public welfare assistance . . . involves the most basic needs of impoverished human beings," the Court, speaking through Mr. Justice Stewart, concluded that "we can find no basis for applying a different constitutional standard." *Dandridge, supra*, at 485.

> "And it is a standard true to the principle that the Fourteenth Amendment gives the federal courts no

> power to impose upon the states their views of what constitutes wise economic or social policy . . . the Equal Protection Clause does not require that a state choose between attacking every aspect of a problem or not attacking it at all. It is enough that the state's action be rationally based and free from invidious discrimination." *Dandridge, supra,* 485-486.

In the instant case, appellees are admittedly not attacking the rather complex formula for funding public education in Florida. They are homing in, as it were, on one of a series of provisions relating to the Minimum Foundation funding scheme presently in use in Florida and asserting that the operation of this statute denies to Florida school children an equal economic educational opportunity. Assuming *arguendo* that the Equal Protection Clause requires that every youngster is entitled to an equal economic educational opportunity (a position this Court has never taken) there has not been nor can there be made any showing that Florida school children are, in fact, discriminated against in any economic sense through the operation of the statute here under attack.

In truth and fact, §236.251, Florida Statutes, is not a funding statute at all, but simply an artificial device used to more equally adjust per pupil expenditures throughout the several school districts of Florida. It is a legitimate manifestation of Florida's concern that *ad valorem* taxpayers in each county should bear the same brunt tax impactwise per mill of tax levied in their support of the public school system. It bespeaks state concern for other worthwhile programs funded either in whole or in part from local sources, which programs compete with public education for tax dollar sustenance.

For the above and foregoing reasons, §236.251, Florida

Statutes, should be put to the "rational basis" and not the "compelling state interest" test enunciated in *Shapiro v. Thompson*,[9] although we believe it will pass muster when viewed from either vantage point.

IV.

THE THREE-JUDGE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT, MOTION OF PLAINTIFFS BELOW, AND INVALIDATING §236.251, FLORIDA STATUTES.

As asserted earlier, the Three-Judge District Court for the Middle District of Florida should have "stayed its hand" while a state Court of competent jurisdiction determined the constitutionality of §236.251, Florida Statutes, vis-a-vis the Florida Constitution, which issue is squarely presented in the *Christian* case. Had that Court done so the determination of the Fourteenth Amendment question contained in the case *sub judice* might very well have been obviated. All of the prerequisite elements to the application of the federal abstention doctrine enunciated in *Meridian* and *Reetz* are present here and this doctrine should be applied in this case.

In its decision, the Three-Judge District Court stated that the [millage rollback] "act prevents the poor counties from providing *from their own taxes* [emphasis contained in the original] the same support for public education

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[9] 394 U.S. 618 (1969). This case involved the constitutionality of a one year residence welfare requirement. In striking down this requirement, the Court found the rationale to be an apportionment of future benefits according to past tax contributions, a classification it considered to be invidious. In doing so, the Court applied the "compelling governmental interest" test to determine whether the Equal Protection Clause had been violated. There is no similarity at all between *Shapiro* and the instant case.

which the wealthy counties are able to provide." (Appendix, p. 48)

The order below does not and cannot grant the relief requested by appellees or claimed by the Court, i.e., dollar equality per-pupil.

Act or no act, no amount of judicial wand waving is going to change the basic premise inherent in the quoted portion of the Court's opinion. Counties that are property poor in relation to their student numbers are going to stay that way and the Charlotte County types are going to retain their favored status.

Assume that there were no 10 mill cap and that rich and poor counties alike could levy millage to their heart's content. Assume also that Charlotte County added an additional five mills raising to $1,087.50 the per pupil amount that would be raised at that rate. In order for his child to achieve some semblance of economic parity with the Charlotte County child, a Bradford County *ad valorem* taxpayer-parent would have to agree to tax himself at the rate of 312 mills. The power to tax is truly the power to destroy!

The Court below concluded that Florida's Millage Rollback Act was violative of the Equal Protection Clause because there was "no rational basis" for its enactment. (Appendix p. 50) Because the Court correctly applied this traditional test and specifically declined to explore "the fundamental-right-to-an-education thesis" (Appendix p. 50) and the "compelling governmental interest" (Appendix p. 50) test set out in *Shapiro v. Thompson*, we necessarily conclude that the Court recognized that the provision under attack is socio-economic in nature and need not be tested by the "compelling governmental interest" test.

That the Court could find "no rational basis" for the en-

actment of the Millage Rollback Act bespeaks, in our view, a basic misunderstanding of either *ad valorem* taxation or public school financing in Florida. The Court indulged in an unfounded assumption when it posed the following question:

> "What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties?" (Appendix p. 49-50)

We answer: Florida's prime educational interest is to provide as nearly equal an economic educational opportunity as possible for all of its school children regardless of residence. The state has recognized its responsibility to assume the major burden of financing public education in Florida and especially during the transitional period, as emphasis is shifted from local support to increased state support. We feel it to be fiscally sound to impose a moratorium, as it were, on local taxing authority until we are able to narrow the gap that has existed in economic educational opportunity between the several counties because of the socio-economic fact that some are property poor in relation to the number of students in the public schools and some are property rich in relation to their student population.

Lastly, the Court below has seen fit to tread in an area fraught with judicially unmanageable imponderables. It has struck down a state *ad valorem* tax limitation statute because it was related to a standard having nothing to do with the "educational needs" of the several counties. (Appendix p. 49) However, the Court did not assume the correlative judicial burden of defining "educational needs". In the two instances where cases involving the constitutionality of equalized public school expenditures have come before this Court, the Court has pointedly declined to hold

unconstitutional the state public school financing schemes involved.[10] In both of these cases, Three-Judge District Courts held in essence that the states of Illinois and Virginia were not constitutionally compelled to equalize expenditures in their school districts. This Court *per curiam* affirmed both findings of the lower Courts.

It is respectfully submitted that the sentiment expressed in the opinion of the Three-Judge District Court in the *Burruss* case seems particularly apropos as it relates to the instant case. It stated:

> "The courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the state."

The case under consideration is no different in principle from *McInnis* or *Burruss*. The factor of "educational need" is the common tie that binds the three cases. The Three-Judge District Court should have followed the reasoning in *Burruss* and *McInnis*.

For the above and foregoing reasons it is respectfully submitted that the Three-Judge Panel below erred in granting plaintiffs' motion for summary judgment and invalidating §236.251, Florida Statutes.

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[10] *McInnis v. Shapiro*, 293 F.Supp. 327 (N. D. Ill.), aff'd. *per curiam sub nom McInnis v. Ogilvie*, 384 U.S. 382 (1969); *Burruss v. Wilkerson*, 301 F.Supp. 1237, aff'd. *per curiam* 38 U.S. LW 3310 (1970).

CONCLUSION

For the foregoing reasons this Court should reverse and remand.

Respectfully submitted,

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